

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN 19 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                        |   |                            |
|------------------------|---|----------------------------|
| THE STATE OF ARIZONA,  | ) | 2 CA-CR 2010-0312-PR       |
|                        | ) | DEPARTMENT A               |
| Respondent,            | ) |                            |
|                        | ) | <u>MEMORANDUM DECISION</u> |
| v.                     | ) | Not for Publication        |
|                        | ) | Rule 111, Rules of         |
| BRETT RICHARD NICHOLS, | ) | the Supreme Court          |
|                        | ) |                            |
| Petitioner.            | ) |                            |
| _____                  | ) |                            |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200601954

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

\_\_\_\_\_  
Brett R. Nichols

\_\_\_\_\_  
Florence  
In Propria Persona

\_\_\_\_\_  
ESPINOSA, Judge.

¶1 Pursuant to a plea agreement, petitioner Brett Nichols was convicted of child molestation and sexual abuse of a child, both dangerous crimes against children, and sentenced in 2007 to a stipulated, ten-year prison term followed by lifetime probation. The plea agreement specified that the state was not opposed to a review of the lifetime term of probation after Nichols had served ten years. In August 2010, Nichols filed a “Rule 32[, Ariz. R. Crim. P.,] Petition for Sentence Modification for Exceeding Subject Matter Jurisdiction,” and an “Affidavit In Support of Rule 32 Petition for Sentence Modification for Exceeding Subject Matter Jurisdiction.” The trial court denied relief without an evidentiary hearing, and this petition for review followed. We will not disturb the court’s ruling unless it clearly has abused its discretion in determining whether post-conviction relief is warranted. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 Nichols asserted below that a lifetime term of probation is unconstitutional for a variety of reasons, contending it is more “onerous” than a prison term and more intrusive; increases the penalty beyond statutory limits, which implicates the right to a jury trial; and violates the right to equal protection under the Fourth and Fourteenth Amendments to the United States Constitution. On review, he essentially reiterates those claims but contends, in addition, the trial court abused its discretion in finding his claims precluded under Rule 32.2. He argues the probationary term is cruel and unusual and he did not waive the right to challenge its constitutionality. As we understand his argument,

he maintains the court lacked subject matter jurisdiction to impose such a term because of its constitutional defect and asserts questions of jurisdiction may be raised at any time.

¶3 In denying relief, the trial court correctly found that, although Nichols had maintained his claims were based on newly discovered evidence pursuant to Rule 32.1(e), and therefore were exempt from the rule's time limits, he had not specified the "newly discovered material facts" purportedly at the heart of his claims. Ariz. R. Crim. P. 32.1(e). The court further found none of Nichols's claims fell under Rule 32.1(d), (e), (f), (g) or (h), and they therefore were precluded. *See* Ariz. R. Crim. P. 32.2(a). Because Nichols raised a claim that appears to have been cognizable under Rule 32.1(a), which is not excepted from the time limits set forth in Rule 32.4(a), the court did not err in summarily dismissing the petition.

¶4 To the extent Nichols suggests he may challenge the legality of his probation term at any time because such a claim is jurisdictional in nature, he is mistaken. Even assuming *arguendo* that a lifetime term of probation is unlawful, that does not mean the trial court lacked subject matter jurisdiction to impose the term. *See State v. Bryant*, 219 Ariz. 514, ¶ 17, 200 P.3d 1011, 1015 (App. 2008) (claim of illegal sentence does not implicate court's subject matter jurisdiction). The purported illegality of Nichols's sentence is not an issue related to subject matter jurisdiction but rather a claim of error that can be forfeited. Similarly, although Nichols contends he has raised constitutional challenges to a lifetime term of probation, most constitutional claims may be waived. Indeed, a defendant's claim that his "conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona," raised pursuant to Rule

32.1(a), is subject to preclusion under Rule 32.2 and barred by an untimely filing pursuant to Rule 32.4. Nichols fails to develop any argument that his constitutional claims fall within an exception to this general rule. *See Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d at 954 (“An alleged violation of the general due process right of every defendant to a fair trial, without more, does not save that belated claim from preclusion.”).

¶5 We grant Nichols’s petition for review but for the reasons stated herein, we deny the relief requested.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Presiding Judge